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Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents

REPLY BRIEF FOR PETITIONER

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I

The first part of respondents' argument is devoted to the proposition that the district court had some inherent extra-statutory power—specifically by virtue of Rule 44 of this court's General Admiralty Rules—to transfer this admiralty action; and that, therefore, any limitations attaching to the transfer power under 28 USC 1404a do not apply in this case.

It should be noted, however, that Rule 44's authorization to the district courts to regulate their practice is not plenary.[1]

Rule 44 itself limits its application to "cases not provided for by these rules or by statute".

Congress having enacted a statute governing transfer of all actions, including admiralty actions, a district court may not transfer an admiralty action otherwise than as provided by the statute.

II

Respondents also make the argument that there is no practical difference, and hence that there should be no difference in legal treatment, between *in-rem* and *in-personam* actions, since both classes take effect against the property of the opposing party.

Respondents intimate, on page 20 of their brief, that the only result of an *in-rem*, as distinguished from an *in-personam*, admiralty suit, is "to force the appearance of the shipowner and secure payment of the claim";

[1] *Cf. Washington & Southern Navigation Co. vs Baltimore & Philadelphia Steamboat Co.*, 263 US 629, 635-36 (1924): "No rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity, or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred"; *Atlass vs Miner*, 265 F2d 312 (CA 7-1959), cert. gr., 361 US 807 (Rule 44 does not authorize a local rule for oral discovery depositions in admiralty); *Strusa vs Minnesota Atlantic Transit Co.*, 13 FS 872 (WD NY-1936) (local rule cannot extend right to trial by jury in admiralty cases beyond statutory authorization therefor).

and, on pages 23-24, that "the *in rem* principles . . . are identical to the *in personam* principles after a claim has been made and bond filed".

In the first place, any similarity in the effect of local and transitory actions, does not alter the established distinction between the jurisdictional requirements as to the two types of actions.

If two residents of New York are the opposing parties at interest in a mortgage foreclosure, or other local action, concerning land in California, the action can nevertheless be entertained only by a California court. *Ellenwood vs Marietta Chair Co.*, 158 US 105 (1895). The lack of jurisdiction in the courts of New York cannot be cured by the defendant's waiver, as lack of personal jurisdiction of a transitory action could be. *Northern Indiana Railroad Co. vs Michigan Central Railroad Co.*, 15 How. 233 (1853).

In the second place, there is more substance to the distinction between *in-rem* and *in-personam* admiralty actions than respondents have conceded.[2]

The privilege of suing a vessel *in rem* is more than a mere security device, and the "personalization of the

[2] It may be noted that *The Bold Buccleugh*, 7 Moore 267, 13 ER 881 (1851), cited on page 20 of respondents' brief as authority for the statement that the *in-rem* action is only a means of compelling the shipowner's appearance, seems to be directly to the contrary: "It is not correct . . . to say that the proceeding *in rem* is in all respects analogous to the proceeding *(in personam)* by foreign attachment, and that the former is merely to compel an appearance, because the latter is undoubtedly for that purpose only." 7 Moore at 283, 13 ER at 890. See footnote 6, *post*.

vessel" which permits such a suit is no mere legal fiction, as shown by the quotation from the leading admiralty authority on page 23 of respondents' own brief.

Benedict states that "the doctrine of the personality of the ship may be described as a fiction"—"but", he adds, "the fiction is rather in the mode of expression than in the substance of the law".

He goes on to point out that "the principle is that one who has a contract, to which the ship is bound and which is breached, or who, through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship. The mode of enforcement is that the ship is condemned and sold under a decree which, as it is founded on dominion over the *res*, binds not only the parties who appear in court but all who have any interest in the vessel, or, as the phrase goes, 'all the world.' . . . Remedies *in rem* and *in personam* may co-exist, or one may be independent of the other."[3]

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[3] 1 *Benedict on Admiralty* (6th ed.) 17, 27, sections 11, 16. "A suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind, a suit in rem, asserting the claim of the libellant to the thing, as against all the world. . . . An admiralty lien . . . (is not) 'only a privilege to arrest the vessel for the debt' . . . (but) is a real and vested interest in the thing . . . to be executed by a judicial process against the thing, to which no person is made a party, save by his voluntary intervention and suit". *The Young Mechanic*, 30 FC 873, 876 (CC Me.-1855), per Curtis, Circuit Justice.

This is a unique concept, which obtains only as to vessels in admiralty. If injury is caused by a motor vehicle, the vehicle itself can be made to respond only if its owner himself was at fault, and then only through ancillary process in execution of a judgment first obtained against the owner.

But injury wrongly caused by a ship may be redressed directly against the ship alone, even when her owner was not at fault. Thus, the ship may be sued although she was completely beyond her owner's control and responsibility when the injury was caused.[4]

When, for instance, a vessel under bareboat charter is in collision as a result of negligence of her crew, the vessel is liable *in rem*, even though an action *in personam* would not lie against her owner.[5]

A vessel which has been sold remains liable *in rem* for collision damage caused, prior to the sale, by her fault, although her new owner could not be sued *in personam* for the damage.[6]

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[4] "Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." *Canadian Aviator, Ltd. vs United States*, 324 US 215, 224 (1945).

[5] *The Barnstable*, 181 US 464 (1901). See *Turner vs United States*, 27 F2d 134 (CA 2-1928). The "settled rule is that if the shipowner provides the vessel only, and the master and crew are selected by the charterer, the latter and not the shipowner is responsible for their acts." *The China*, 74 US 53, 70 (1868) (concurring opinion).

[6] *The Bold Buccleugh*, 7 Moore 267; 13 ER 884 (1851), discussed in footnote 2 above, approved in *The John G. Stevens*, 170 US 113 (1898). "The maritime 'privilege' or lien . . . accompanies the property into the hands of a bona fide purchaser." *Vandewater vs Mills*, 19 How. 82, 89 (1856). See also *The China*, 74 US 53, 68 (1868).

A ship is liable *in rem* for collision damage resulting from negligence of an independent pilot to whom the owner was required by law to confide his vessel, and for whose wrongful acts the owner is not liable *in personam*.[7]

Other cases in which the vessel may be condemned *in rem*, although the owner is not responsible *in personam*, include forfeitures,[8] non-contract salvage claims,[9] and claims on bottomry bonds.[10]

Such *in-rem* proceedings cannot meaningfully be equated with proceedings *in personam* against the ship's owner; and the cases, cited on pages 20-22 of respondents' brief, holding that the owner or charterer whose liability coincides with that of the ship, may limit the ship's liability as well as his own, do not blur the distinction between admiralty proceedings *in rem* and those *in personam*.

III

This reduces the case to the basic question whether *in-rem* admiralty jurisdiction may be conferred by *ex parte* waiver, by the claimant of the *res*.

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[7] *The China*, 74 US 53 (1868); *Homer Randall Transp. Co vs Compagnie Générale Transatlantique*, 182 US 406 (1901).

[8] *United States vs Brig Malek Adhel*, 2 How. 210 (1844).

[9] *Lambros Seaplane Base vs The Batory*, 215 F2d 228 (CA 2-1954); Rule 18 of this court's Admiralty Rules; Robinson, *Handbook of Admiralty Law* (1939) 737, section 99.

[10] Rule 17 of this court's Admiralty Rules.

It is respectfully submitted that the decisions cited by respondents as indicative of the affirmative view, are erroneous.

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